

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

APR 15 2002

BC

Michael N. Milby, Clerk

MARK NEWBY, et al.

Plaintiffs,

vs.

ENRON CORP., et al.

Defendants.

No. H-01-CV-3624

(Consolidated Action)

PIRELLI ARMSTRONG TIRE
CORPORATION RETIREE
MEDICAL BENEFITS TRUST,
Derivatively On Behalf of ENRON
CORPORATION, et al.,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

No. H-01-CV-3645

(Consolidated Action)

TITTLE, et al.,

Plaintiffs,

vs.

ENRON CORP., et al.

Defendants.

No. H-01-CV-3913

(Consolidated Action)

DEFENDANT ANDREW S. FASTOW'S MOTION
TO POSTPONE DISCOVERY DURING PENDENCY
OF CRIMINAL PROCEEDINGS

Defendant Andrew S. Fastow seeks a postponement of discovery from him only
in order to protect his constitutional rights:

478

Plaintiffs in the *Title consolidated* ERISA cases seek discovery from Fastow regarding his role at Enron and with various partnerships that dealt with Enron. At the same time, the United States Government has instituted a criminal investigation of Fastow concerning the same events. If Fastow responds to the civil discovery, he jeopardizes his Fifth Amendment privilege against self-incrimination by creating the possibility his answers will aid the prosecution of him. If Fastow invokes his Fifth Amendment privilege, he risks severe prejudice in this civil action that could amount to a forfeiture of his due process right to defend this case. Fastow thus faces an impossible choice, a so-called Hobson's choice, where selection of either alternative will damage a constitutional right.

When confronted with a party facing this impossible choice, both this Court and the Fifth Circuit have fashioned a remedy that balances the interests of litigants in pursuing their civil damages claim while still protecting the rights of a individual subject to criminal investigation. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *Kmart Corp. v. Aronds et al.*, Civ. No. H-96-1212 (S.D.Tex. Dec. 11, 1996) (Ex. 1). That remedy postpones discovery (and, if necessary, trial) until after conclusion of all criminal proceedings. Fastow asks for precisely that remedy.

1. PROCEDURAL BACKGROUND

The collapse of Enron Corporation ("Enron") has given rise to raft of civil lawsuits and a federal criminal investigation. The civil and criminal proceedings cover the same subject matter, thus creating creating an irreconcilable conflict between Fastow's Fifth Amendment privilege and his defense of the civil case.

1.1 The Civil Cases

Many of Plaintiffs' allegations in these consolidated civil actions relate to partnerships connected to Fastow and other dealings regarding Enron. *See, e.g., Newby* First Amended Complaint (*Newby*), ¶¶ 23-29; *Tittle* First Amended Complaint (*Tittle*), ¶¶ 301-349. Even though Plaintiffs brought these cases under a wide spectrum of legal theories, including securities fraud, RICO, and conspiracy, the core factual allegations, at least as to Fastow, do not vary from case to case regardless of the legal theory. All of the plaintiffs allege that Fastow, Enron officials, Arthur Andersen, and other defendants failed to make proper disclosure regarding certain partnerships connected to Fastow and that they used those partnerships to facilitate the issuance of misleading financial results for Enron. *See, e.g., id.* They assert Fastow and others used various partnerships, including LJM-Cayman, LJM-2, Raptor, and Southampton as part of a fraudulent scheme to deceive Plaintiffs and to enrich themselves. The complaints in the consolidated civil cases quote liberally from press accounts regarding Enron, most of which have not expanded their coverage beyond these partnerships.

1.2 The Criminal Investigation(s)

Since January, a special government task force has been investigating possible criminal activity in connection with the Enron collapse. Ex. 2.¹ Shortly after announcement of the task force, "Experts in securities law said the findings in the 218-page [Enron Special Committee] report suggest that former Enron chief financial officer Andrew Fastow . . . is most vulnerable to possible criminal charges." Ex. 3.² Recent reports state that "[p]rosecutors have opened a new phase in their investigation of the

¹ *U.S. Opens Criminal Inquiry Into Enron*, Houston Chronicle, January 10, 2002, at A01.

² *Ex-Chairman Of Enron Cancels Hill Testimony*, The Washington Post, February 4, 2002, at A01.

collapse of Enron Corporation . . . to focus on executives of Enron and their activities . . .
.” Ex. 4;³ see Ex. 5.⁴ Moreover, “prosecutors in Houston [have] convened a special
grand jury, charged solely with investigating possible crimes relating to Enron’s collapse,
and new subpoenas have already been issued.” *Id.* Fastow has become one of the
primary targets of that investigation. *Id.*

The criminal investigation focuses on the same underlying facts as the
consolidated civil actions -- the partnerships with alleged connections to Fastow:

The government is devoting the closest attention to specific
transactions involving a series of partnerships controlled by
the company's former chief financial officer, Andrew S.
Fastow. In particular, the focus is on deals involving a
quartet of partnerships known as the Raptors, as well as
another partnership known as Southampton Place, which a
number of Enron insiders used to enrich themselves.

Id. The very day of this filing, *The New York Times* featured a front-page story detailing
the government’s investigation of insiders at Enron. The story, which included a picture
of Fastow, said:

The government is focusing on a series of individual
transactions involving partnerships controlled by the
company’s former chief financial officer, Andrew S.
Fastow. . . .

. . .

. . . Investigators are now studying those deals to see if they
were part of a massive securities fraud scheme designed to
misrepresent the company’s true performance.

Ex. 6.⁵

³ *Special Grand Jury Zeroes In On Enron Executives*, *The New York Times*, April 1, 2002, at B01.

⁴ *Panel Sets Its Sights On Raptor Ventures*, *Houston Chronicle*, April 2, 2002, at B01.

⁵ *U.S. Inquiry Tracks Insiders At Enron*, *The New York Times*, April 15, 2002, at A01.

Due to the crossover between the criminal and civil cases, Fastow cannot respond to discovery in the consolidated civil actions without providing a steady stream of information to the government for use in its criminal investigation. To avoid providing direct assistance to the criminal investigation, Fastow must invoke his Fifth Amendment privilege in response to civil discovery. However, even if Fastow were to exercise his Fifth Amendment privilege in response to discovery, his invocation of that privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of him, and he would face the possibility of a negative inference being drawn in the civil case from that invocation of the Fifth Amendment.

2. ARGUMENT & AUTHORITIES

2.1 The interests of justice require a postponement of discovery from Fastow until resolution of all criminal proceedings.

2.1.1 Fifth Circuit law requires a postponement of discovery to protect the constitutional rights of litigants subject to criminal proceedings.

In *Kmart*, this Court wrote: “Courts have the inherent authority to stay civil proceedings during the pendency of parallel criminal prosecutions when required by the interests of justice.” Ex. 1, at 4. Since 1979, the Fifth Circuit has held that a district court should abate discovery in a civil action when proceeding with that discovery would force a litigant to choose between responding to the request and exercising the Fifth Amendment privilege. *Wehling*, 608 F.2d at 1087-88; *see Brumfield v. Shelton*, 727 F.Supp. 282, 284 (E.D. La. 1989).

An individual party to a civil action has, “in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action.” *Id.* “The [Supreme] Court has emphasized that a party claiming the Fifth Amendment

privilege should suffer no penalty for his silence” *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). A district court may not follow any procedure that “require[s] a party to surrender one constitutional right in order to assert another.” *Id.* Forcing a litigant to invoke the Fifth Amendment in the course of civil litigation amounts to a forfeiture of the due process right to a judicial determination of the civil action. *Id.*; see *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987); *Trustees of the Plumbers & Pipefitters Nat’l Pension Fund v. Transworld Mechanical, Inc.*, 886 F.Supp. 1134, 1138-39 (S.D.N.Y. 1995); *Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40-42 (S.D.N.Y. 1993).

On the basis of *Wehling*, this Court decided to stay civil proceedings as to all defendants in the *Kmart* action, where there were some civil defendants “facing criminal indictments and many of the others involved in the alleged scheme to defraud Kmart face[d] a real risk of self-incrimination.” Ex. 1, at 6. In *Wehling* itself, the Fifth Circuit held that the district court should have postponed the civil action for *three years*, rather than placing one of the parties in the position of having to invoke the Fifth Amendment in response to discovery. See 608 F.2d at 1088.

In both the *Plumbers & Pipefitters* and *Volmar* actions, the plaintiffs had asserted civil claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §1961 et seq. (“RICO”) against various defendants: the very same types of claims the *Tittle* plaintiffs have asserted against Fastow and in support of which they seek discovery in this case. Compare 886 F.Supp. at 1138; 152 F.R.D. at 38 with *Tittle*, ¶¶ 784-806. The factual identity between the criminal and civil actions led to stays of the civil case in

Pipefitters & Plumbers and *Volmar*. “The inconvenience and delay to plaintiffs that will unfortunately be caused by a stay are outweighed by the defendants’ significant Fifth Amendment concerns” *Plumbers & Pipefitters*, 886 F.Supp. at 1140.

2.1.2 The pending criminal investigation regarding Fastow requires a stay of any discovery sought from him in the civil action.

“The first question to be resolved is the extent to which the issues in the criminal case overlap with the those present in the civil case, since self-incrimination is more likely if there is a significant overlap.” *See Plumbers & Pipefitters*, 886 F.Supp. at 139. There cannot be more overlap between the criminal prosecution and the civil case than exists here. Prosecutors have targeted Fastow in a criminal investigation involving Enron that focuses on the LJM-Cayman, LJM-2, Raptor, and Southampton partnerships, among other matters. Ex. 4. Thus, the government’s criminal investigation, Plaintiffs in this case, and the Enron Special Committee investigating Fastow’s dealings with the company and those partnerships have made allegations of improper conduct against Fastow. In what is now commonly referred to as the “Powers Report” the Enron Special Committee took particular aim at Fastow and the various partnerships. Ex. 7.⁶ Fastow’s dealings with Enron and the partnerships also form the basis for allegations made against him in the consolidated civil cases.

The nexus between the civil allegations and criminal investigation in this case satisfies the requirements for postponement of discovery. Just as this Court did in *Kmart*, the Fifth Circuit found the factual nexus between civil and criminal proceedings sufficient when where both sets of proceedings involved the same underlying transactions, which, in *Wehling*, pertained to schools that allegedly defrauded their

⁶ *Top Executives Blamed In Enron’s Fall*, The Washington Post, February 3, 2002, at A01.

students and the federal government. *See* 608 F.2d at 1086. Similarly, although the government has not yet filed any charges, the criminal investigation(s) of Fastow “involve a number of the same transactions and are essentially identical to the civil actions filed in this Court.” Ex. 1, *Kmart*, at 5.⁷ In the absence of a discovery postponement, Fastow would face the Hobson’s choice described earlier: sacrificing his Fifth Amendment privilege or invoking that privilege and risking severe prejudice in the defense of this civil action.

The balancing of interests in this case favors a postponement of discovery as to Fastow. The interest Plaintiffs assert is the right to a speedy resolution of their case and discovery from all defendants during the prosecution of the case. Preventing plaintiffs from taking discovery of Fastow during the pendency of a criminal investigation would not so prejudice them so as to warrant eviscerating Fastow’s constitutional rights. Mere “inconvenience and delay to plaintiffs” does not provide a sufficient basis to make the showing of undue burden required for denial of a stay. *See Volmar*, 152 F.R.D. at 40. “[U]nder settled authority the Fifth Amendment is the more important consideration.” *Id.*

In this case, a postponement of discovery may cause some delay in Plaintiffs’ prosecution of claims against Fastow, but it would not otherwise prejudice their claims. Fastow actually seeks less relief in this case than what this Court granted in *Kmart*. There, the Court stayed the civil actions altogether. Ex. 1, at 6. Here, Plaintiffs in the consolidated cases may still proceed against other defendants and obtain discovery from

⁷ The absence of an indictment or formal charges has no bearing on Fastow’s right to a stay, so long as he “reasonably apprehends a risk of self-incrimination,” “even if the risk of prosecution is remote.” *Wehling*, 608 F.2d at 1087 n.5. In *Kmart*, this Court ordered a stay to protect the rights of all defendants facing the possibility of self-incrimination, not just those who had already been charged. Ex. 1, *Kmart*, at 6. The individuals the Fifth Circuit found to be entitled to a stay in *Wehling* also had not yet been charged. *See* 608 F.2d at 1086.

them in this action regardless of any postponement as to Fastow. Fastow does not, at this time, seek a stay of the entire civil action during the pendency of the criminal investigation. Rather, he seeks only a postponement of discovery that Plaintiffs might seek to take from him.⁸ Plaintiffs may still proceed with discovery from the many other individual defendants they have named in this case, as well as the numerous entity defendants. Given the likely volume of products of discovery, temporarily postponing Plaintiffs' ability to pursue discovery from a single individual defendant will impose little inconvenience or delay upon Plaintiffs. Thus, the balance of interests favors a postponement of discovery from Fastow.

2.2 A postponement will avoid improper sharing of discovery between the criminal investigations and civil lawsuits.

“Parallel proceedings may result in the abuse of discovery.” *Afro-Lecon*, 820 F.2d at 1203. The broad scope of civil discovery, as compared to the narrow scope of criminal discovery, may present the prosecution with “an irresistible temptation to use that discovery to one’s advantage in the criminal case.” *Id.* “Given the much more restrictive discovery provisions available in criminal cases as opposed to those in civil actions, the Court must be particularly sensitive of demands imposed on a defendant faced with parallel criminal and civil actions.” Ex. 1, *Kmart*, at 4.

The complexity of issues raised by the Enron collapse will only add to the temptation for abuse of civil discovery. The multifaceted nature of events apparently led prosecutors to abandon the search for an “overarching criminal theory to explain Enron’s collapse last fall.” Ex. 4. Rather, the “strategy is to seek out small, well-defined parts of

⁸ In the event it appears criminal proceedings will not be resolved prior to the anticipated December 1, 2003 trial date in this action, Fastow will apply to the court for a stay of the trial against him in this case pursuant to the authority of *Wehling*.

the case.” *Id.* Prosecutors could use civil discovery to choose the “well-defined portions of the case” in which they wish to bring charges. Such actions would undermine the fundamental separateness of the criminal and civil proceedings, and amount to a *de facto* unconstitutional expansion of discovery in the criminal proceedings. *See Afro-Lecon*, 820 F.2d at 1203.

Civil discovery provides prosecutors with an unfair advantage. Sitting on the sidelines, watching the prospective defendants’ testify to protect themselves, prosecutors can endlessly refine their attack, indicting, superseding indictments, and waiting for the best evidence before proceeding. This Court can avoid that inevitable yet improper sharing of criminal and civil discovery only by ordering a postponement of discovery sought from Defendant Fastow.

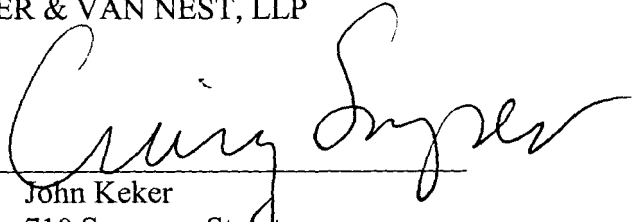
3. CONCLUSION

For all of the foregoing reasons, Fastow respectfully requests that this Court grant his Motion to Postpone Discovery During Pendency of Criminal Proceedings.

Respectfully submitted,

KEKER & VAN NEST, LLP

By: _____


John Kecker
710 Sansome Street
San Francisco, California 94111
Telephone (415) 391-5400
Facsimile (415) 397-7188

**ATTORNEY-IN-CHARGE FOR
DEFENDANT ANDREW FASTOW**

OF COUNSEL:

SMYSER KAPLAN & VESELKA, L.L.P.

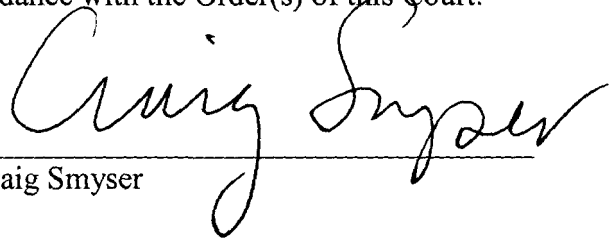
Craig Smyser
State Bar No. 18777575
Asim Bhansali
State Bar No. 90001290
700 Louisiana, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 - Facsimile

CERTIFICATE OF SERVICE

This is to certify that on **April 15, 2002** a true and correct copy of the above and foregoing instrument was served on counsel listed below by facsimile transmission or certified mail, return receipt requested, in accordance with the Order(s) of this Court.

SEE ATTACHED SERVICE LIST

Craig Smyser

A handwritten signature in cursive script, reading "Craig Smyser", written over a horizontal line.

The Exhibit(s) May
Be Viewed in the
Office of the Clerk